BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROSEMARY BACHMURSKI	)	
Claimant	)	
	)	
VS.	)	
	)	
THE FARM, INC.	)	
Respondent	)	Docket Nos. 176,960 &176,961
	)	
AND	)	
	)	
CIGNA (ACE-USA INSURANCE CO.)	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the November 23, 2009 Post Award Medical Order by Administrative Law Judge (ALJ) Brad E. Avery.

APPEARANCES

Mitchell D. Wulfekoetter, of Topeka, Kansas, appeared for the claimant. Matthew J. Schaefer, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the transcript of the post-award hearing.

ISSUES

The ALJ found that he had no jurisdiction to hear the respondent's post-award request to change claimant's authorized physician and dismissed respondent's request. He went on to state that if this ruling were reversed and there was jurisdiction, he would

find that there is no evidence that the current health care provider, Dr. Hall, is unsatisfactory and the motion to change physicians would be denied.[1]

The respondent requests review of the ALJ's Order, arguing that regardless of the statutory language, both the ALJ and the Board have inherent jurisdiction to consider respondent's post-award requests. And that to do otherwise would deprive the respondent of "two procedural tools".[2] Respondent also contends that the care provided by Dr. Hall is contrary to well-accepted medical principles and that Dr. Sankoorikal is better suited to provide claimant's ongoing care.

Claimant argues that respondent has no statutory authority to make this post-award request for a change of physician and that as such, the ALJ had no jurisdiction to consider respondent's request. Claimant also contends that Dr. Hall's treatment is not only satisfactory to claimant but provides relief from her ongoing symptoms and should be continued, regardless of respondent's displeasure over Dr. Hall's chosen course of treatment. Accordingly, the ALJ's Post-Award Medical Order denying the request to change claimant's treating physician should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

Claimant suffered a compensable injury in 1992 and an Award was issued in 2004. Since that time she established a treatment relationship with Dr. Roy Hall, a family physician, who presently provides authorized treatment for claimant's ongoing complaints, including Fibromayalgia, associated with her work-related accident. At the heart of the parties' dispute is the fact that in 2007, at claimant's request, Dr. Hall prescribed Marinol. Marinol "has the same active ingredient" - THC - as marijuana.[3] There is no dispute that the use of Marinol in this manner is "off label", that claimant requested the drug, only after some discussion was the drug prescribed, and according to claimant, the drug provides her with significant relief.

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[1] ALJ Order (Nov. 23, 2009) at 3.

[2] Respondent's Brief at 5-6 (filed Dec. 31, 2009).

[3] P.A.H. Trans. at 35.

Respondent questioned claimant's treatment with Dr. Hall[4] and scheduled an appointment for an evaluation with Dr. Joseph Sankoorikal. Dr. Sankoorikal is board certified in physical medicine and rehabilitation. He examined claimant on October 6, 2008 and reviewed her rather extensive collection of medical records. Dr. Sankoorikal diagnosed her with chronic pain which is likely muscololigamentous in nature with the possibility of fibromyalgia/myofascial pain components.[5] He testified that a comprehensive approach is the best method of alleviating fibromayalgia symptoms. He suggested a course of treatment which is designed to "bring the pain level down as much as possible"[6] but specifically does not include[7] Marinol in that regimen. He testified that Marinol is used for two purposes: 1) as an appetite stimulant and 2) as an anti-emetic, anti-nausea remedy for people taking chemotherapy. Chronic pain is not an approved use of this drug. More importantly, while he is prepared to take claimant on as a patient, he conceded that he would do so only if she was willing and if not willing, then "in all practical sense we'd be wasting our time."[8]

Armed with his report, respondent notified claimant of its intent to redirect her care from Dr. Hall, who had previously been authorized, to Dr. Sankoorikal. Claimant refused to agree to this change and respondent turned to the Court for a resolution. Respondent first attempted to file a request for a post award hearing. For whatever reason, the applications section of the Division of Workers Compensation took it upon itself to reject that filing and returned the document to respondent's counsel.[9] Respondent then filed an Application for Hearing (E-3) on February 26, 2009 coupled with a Notice of Intent. A Notice of Hearing was served and that document referenced a post-award medical request to change claimant's authorized treating physician. The hearing was held without objection and the matter was handled as a post-award matter under K.S.A. 44-510k, with terminal dates established and the physicians' testimony submitted by deposition.

The ALJ issued his Order on November 23, 2009 and held that he had no jurisdiction to change claimant's health care provider because K.S.A. 44-510h(b)(1) allows

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[4] Respondent concedes Dr. Hall was authorized to treat claimant. But it is clear that when the underlying claim was settled, no physician was designated as the treater and thus, there was no Award that designated Dr, Hall as the authorized physician.

[5] Sankoorikal Depo. at 11.

[6] *Id.* at 15.

[7] *Id.* at 19.

[8] *Id.* at 35.

[9] The decision to reject this filing was made by the applications department and was done without any judicial direction. The Board finds this practice to be inconsistent with the purposes of the Act. It is not for the applications unit to decide what should and should not be filed.

only the claimant to request a change of physician. The ALJ went on to find that even if he had jurisdiction, he would not grant respondent's request as he was not persuaded that Dr. Hall's treatment was unsatisfactory. This appeal followed.

The threshold issue presented in this case is whether there is statutory authority for the respondent to request, post-award, a change of physician in connection with claimant's ongoing medical treatment. Respondent contends both the ALJ and the Board have jurisdiction to consider its request in spite of the limiting language in K.S.A. 44-510h(b)(1) and K.S.A. 44-510k(a). Jurisdiction is generally defined as authority to make inquiry and decision regarding a particular matter.[10]

As noted by the ALJ, two statutes are relevant.

K.S.A. 44-510h(b)(1) states in pertinent part:

> If the director finds, **upon application of an injured employee**, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. (emphasis added)

K.S.A. 44-510k(a) provides in relevant part:

> At any time after the entry of an award for compensation, the **employee may make application for a hearing**, in such form as the director may require for the furnishing of medical treatment. (emphasis added)

As noted by the ALJ, both of these statutes indicate that only the employee may ask for post-award medical benefits and for a change of physician. The ALJ's analysis is somewhat appealing in that it is often the claimant that is dissatisfied with a physician's conduct, performance or bedside manner and given the nature of the physician/patient relationship, there should be an avenue for a claimant to seek a change in his authorized physician. K.S.A. 44-510h(b)(1) provides that option to the claimant. Similarly, after claimant has resolved the initial litigation process and has received his award, the need for medical treatment often continues. K.S.A. 44-510k provides the mechanism for the claimant to obtain that treatment in those instances that respondent or its carrier are not willing to provide the sought-after benefits.

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[10] See *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683, P.2d 902 (1984).

And while these statutes only reference an employee, these are not the only statutes contained within the Act that deal with a party's entitlement to a hearing as it relates to medical treatment or, for that matter, any dispute as to benefits available under the Act.

K.S.A. 44-534 provides that:

> Whenever the employer, worker, Kansas workers compensation fund or insurance carrier cannot agree upon the worker's right to compensation under the workers compensation act or upon **any issue** in regard to workers compensation benefits due the injured worker thereunder, the employer, worker, Kansas worker's compensation fund or insurance carrier may apply in writing to the director for a determination of the benefits or compensation due or claimed to be due. (Emphasis added)

That same statute goes on to direct the Director of the Division of Workers Compensation to provide a form for this request and to promulgate rules and regulations to implement this statute and directs the administrative law judge to conduct a hearing, after appropriate notice and make a finding concerning the amount of compensation, if any, due to the worker.[11] It has long been held that medical treatment constitutes compensation under the Act.[12]

And even after a case is decided (by Award) or settled (by agreement), there is a statutory avenue for either claimant or respondent to request Review and Modification. K.S.A. 44-528 provides:

> Any award or modification thereof agreed upon by the parties . . . may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party.

Here, the ALJ seemed to consider just the statutes that speak exclusively to a claimant's right to seek a change of physician or post-award medical treatment and did not consider the other statutes referenced above. Contrary to the ALJ's view, these statutes do not foreclose a respondent's right to seek a judicial determination when there is a dispute (post-award) as to the claimant's medical treatment. Rather, they provide a specific procedure when claimant seeks a change in medical provider or additional (post-award) medical treatment. Indeed, it is respondent's obligation to provide medical treatment which is intended to cure and relieve the effects of claimant's injury.[13] That

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[11] K.S.A. 44-534.

[12] *Shields v. J.E. Dunn Constr. Co.*, 24 Kan. App. 2d 382, 946 P.2d 94 (1997).

[13] K.S.A. 44-510h(a).

obligation comes with the right to direct claimant's care, subject to the findings and conclusions of the ALJ. The fact that claimant is satisfied with Dr. Hall and his treatment protocol and wants to continue under his care does not invalidate the other provisions of the Act.

When interpreting statutes, effect must be given, if possible, to the entire act and every part thereof.[14] It is the duty of the Court, as far as practicable, to reconcile the different statutory provisions so as to make them consistent, harmonious and sensible.[15] The legislature intended the Act to apply impartially to both parties.[16]

It is illogical to suggest that either K.S.A. 44-510h(b)(1) or K.S.A. 44-510k(a) forecloses respondent's right to direct an injured employee's care or, after an award is issued, only claimant is permitted to seek a judicial determination of the need for further medical treatment under K.S.A. 44-510k(a). It is certainly more likely that a claimant will be in the position of *seeking* additional treatment or a change of physician. And for those instances, there is a specific statute that authorizes such a request. But those statutes do not invalidate the remaining provisions of the Act which give a respondent the opportunity to file a request for a hearing to resolve a dispute, as here, over its intention to change claimant's treating physician and her unwillingness to acquiesce in that intended change.

Accordingly, the Board reverses the ALJ's Post Award Medical Order and finds that the ALJ did have jurisdiction to consider respondent's request to change claimant's treating physician from Dr. Hall to Dr. Sankoorikal.

Turning now to the merits of the dispute, the majority of the Board finds that respondent should be permitted to redirect claimant's care from Dr. Hall to Dr. Sankoorikal. As noted above, respondent's obligation to provide medical treatment, even after an award is entered, comes with the right to direct the claimant's treatment, subject to the court's findings and orders. Here, there is no Order which designates Dr. Hall as the treating physician. Thus, respondent retains the right to designate the treating physician. The ALJ's finding that he believed there was no evidence that Dr. Hall's treatment was "unsatisfactory" is irrelevant to the determination at hand. That consideration is only relevant to an employee's request for a change of physician. It follows then that respondent's request to designate Dr. Sankoorikal should be granted. The ALJ's Order to the contrary is, therefore, reversed.

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[14] *McIntosh v. Sedgwick County*, 282 Kan. 636, 147 P.3d 869 (2006).

[15] *Id.*

[16] K.S.A. 44-501(g).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post Award Medical Order of Administrative Law Judge Brad E. Avery dated November 23, 2009, is reversed and respondent's request to designate another physician as claimant's authorized treating physician is granted.

IT IS SO ORDERED.

Dated this _____ day of February, 2010.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

CONCURRING IN PART AND DISSENTING IN PART

The undersigned Board Member concurs in the majority analysis with respect to the Board's jurisdiction (as well as the ALJ's) to consider respondent's request to change the treating physician. This member would, however, affirm the ALJ's decision to deny respondent's request to change the treating physician under these circumstances, albeit for a different reason. While the respondent certainly has the authority to choose and designate claimant's treating physician, the evidence in this case makes it clear that Dr. Sankoorikal is of the opinion that if claimant was not willing to transfer her care to him, then "in all practical sense we'd be wasting our time."[17] Claimant's own testimony bears that out. Thus, it would seem that the majority's opinion will permit respondent to designate Dr. Sankoorikal, and by her own testimony, his treatment will not aide claimant in the maintenance of her symptoms. And although respondent has the right to designate

[17] Sankoorikal Depo. at 35.

claimant's treating physician, it would seem to be a futile effort and this member would direct respondent to identify another physician.

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BOARD MEMBER

c: Mitchell D. Wulfekoetter, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge